This contention, however, is not supported by authority. The goods must be actually in process of transportation by the carrier before they become exports. *Coe v. Errol,* 116 U. S. 577; *Clarke v. Clarke,* 3 Wood. 408. In *Clark v. Monroe,* 60 Ga. 61, property was held to be exports, but there it was actually on board the carrier. The test is not whether the goods taxed are to be exported later, but whether they are taxed because they are going to be exported. *Turpin v. Burgess,* 117 U. S. 504. Goods still in the factory, though finished and ready for shipping, are a part of the general mass of taxable property and do not come under the head of exports. *Brown v. Houston,* 114 U. S. 622; *Myers v. Co. Commissioners,* 83 Md. 385; *Nelson Lumber Co. v. Loraine, 22* Fed. 54.

CONTRACTS—GOODS TO BE MANUFACTURED—SALE BY SAMPLE.—IDEAL WRENCH CO. V. GARVIN MACHINE CO., 87 N. Y. SUPP. 41.—The defendant contracted to manufacture a quantity of wrenches, equal in every respect to sample. The purchase price was paid and the goods were delivered and accepted. The wrenches proved to be defective, and were valueless for plaintiff's purposes. *Held,* that, as the contract was to manufacture and deliver and not a sale by sample, the acceptance of the goods precluded a recovery for damages sustained. Laughlin and Hatch, JJ., *dissenting.*

The decision is based upon the hypothesis that to constitute a sale by sample the goods must be *in esse* at the time of sale, a conclusion analogous to the New York doctrine relative to the statute of frauds. When the contract is to manufacture and deliver, as distinguished from a sale by sample, the court adopts the theory that an acceptance of the goods, with opportunity to examine, precludes a recovery for any defects that may exist, the docrine of *caveat emptor* governing. *Iron Co. v. Pope,* 108 N. Y. 232. In a sale by sample, however, there is a warranty surviving acceptance that the goods will substantially conform with the sample, the buyer having the privilege of rejecting them, or accepting and suing for damages. *Zabriski v. R. R. Co.,* 131 N. Y. 72; *Day v. Pool,* 52 N. Y. 416; *Leitch v. Manufacturing Co.,* 64 Minn. 434. This latter proposition, however, in *Briggs v. Hilton,* 99 N. Y. 517, was applied to an executory contract to manufacture, the court deciding that the existence of the goods was immaterial; and the recent case of *Henry v. Talcott,* 175 N. Y. 385, negatives the presumption that the goods must be *in esse* to constitute a sale by sample, holding that the question is one of fact for the jury. In elucidating their position as to the statute of frauds, the New York courts have freely acknowledged that it is continued "at the expense of sound principle," *Cooke v. Millard,* 65 N. Y. 352; and to extend the doctrine to questions outside of its original application would seem anomalous. In view of the prevalent custom of manufacturers to exhibit samples, contracting to manufacture goods in conformity thereto, and considering the underlying reason for exempting sales by samples from the doctrine of *caveat emptor,* it would appear that the application of the rule should not be made dependent upon the existence or non-existence of the subject matter at the time the agreement is made.

CORPORATIONS—FIDUCIARY RELATION OF PROMOTERS—RECOVERY OF SECRET PROFITS BY STOCKHOLDERS.—HUTCHINSON V. SIMPSON, 87 N. Y. SUPP. 369.—The promoters of a corporation to control malting establishments on which

they held options issued subscription blanks, addressed to themselves, containing representations that the capital would be used for specified purposes. A large block of stock remained after the projects enumerated in the contract were consummated, and this they secretly appropriated. *Held,* that an action could not be maintained by stockholders to compel the promoters to account to the corporation for the stock taken. Hatch and Laughlin, JJ., *dissenting.*

A promoter occupies a fiduciary relation towards the corporation and stockholders, and if he retains secret profits, he is liable to account therefor. *Dickerman v. Trust Co.,* 176 U. S. 181; *Brewster v. Hatch,* 122 N. Y. 349; *Hayward v. Leeson,* 176 Mass. 310; *Gluckstein v. Barnes* (1900) App. Cas. 310; and it is not necessary to show a fraudulent intent—it is sufficient that the profits were made secretly. *Land Co. v. Loudenslager,* 55 N. J. Eq. 78; *Nitrate Co. v. Syndicate* (1899), 2 Ch. 392. But the liability of a promoter is predicated upon a violation of the trust relation, and the decision in the principal case is based upon the assumption that the contract was a private one between the signers of the subscription blanks and the promoters, the latter not occupying a fiduciary position towards the corporation. The distinction is a doubtful one, as the acts of the promoters were impliedly ratified by the company, the promoters themselves assuming the management of the same. Where a director sells property to the corporation at an excessive valuation, the company alone can take advantage thereof, a stockholder having no remedy. *Burland v. Earle* (1902) App. Cas. 83; but when the corporation is in control of the promoters, and the officers refuse to act, a suit by the stockholders will be sustained. *Flynn v. R. R. Co.,* 158 N. Y. 493; *Hawes v. Oakland,* 104 U. S. 450. Where there was a sale to the corporation by the promoters, the sale was rescinded, but it was held that equity would not compel the promoters to account for the profits. *Erlanger v. Phosphate Co.,* 3 App. Cas. 1219; but where new equities have arisen, the remedy is not a rescission of the contract, but an action for accounting. *Yale Stove Co. v. Wilcox,* 64 Conn. 101; *In re Olympic,* 2 Ch. 153. Undoubtedly the stockholders have a remedy in the nature of an action of deceit against the promoters. *Brewster v. Hatch, supra.*

DEATH BY WRONGFUL ACT—SURVIVAL OF TORT ACTION—CONFLICT OF LAWS.—SMITH V. EMPIRE STATE-IDAHO M. & D. CO., 127 FED. 462 (C. C.).—*Held,* that an action to recover damages against a master for the death of a servant while in the course of his employment by the master's alleged negligence is a transitory action to enforce a personal liability, which may be litigated in a State other than that in which the accident occurred.

The reasoning of this case seems to illustrate the trend of the law toward recognizing the transitory nature of such actions as a matter of right rather than of mere comity. Early cases in this country held that in absence of proof as to statutes of the State where the death occurred the common law will be presumed to be there in force, and other States will not apply their own statutory remedies to cases arising outside their own borders. *C. & W. I. Ry. Co. v. Schroeder,* 18 Ill. App. 328. So no remedy lay in Maryland for such death in Pennsylvania, the remedy being local and having no force nor vigor outside the State where the statute was made. *State v. Pittsburgh & C. Ry. Co.,* 45 Md. 41. On the other hand, while the foreign